CALIFORNIA LAW REVISION COMMISSION
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November 3, 1997

Date: November 13, 1997	*Place:* Los Angeles
Nov. 13 (Thursday) 9:00 am – 5:00 pm	Wyndham Hotel at LAX Redondo Room 6225 West Century Blvd. 310-670-9000
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please call 650-494-1335 and you will be notified of any late changes.**	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF OCTOBER 9, 1997, MEETING (sent 10/20/97)

2. ADMINISTRATIVE MATTERS

   Suggested Revisions of Meeting Schedule
   Memorandum 97-71 (NS) (sent 11/3/97)

   Report of Executive Secretary

3. TRIAL COURT UNIFICATION (STUDY J-1300)

   Miscellaneous Issues
   Memorandum 97-66 (BG) (sent 11/3/97)
   First Supplement to Memorandum 97-66 (to be sent)

4. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

   OAL Comments and Other Issues on SB 209
   Memorandum 97-73 (RM) (sent 10/23/97)
   First Supplement to Memorandum 97-73 (to be sent)

5. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)

   Comments on Tentative Recommendation
   Memorandum 97-74 (BG) (to be sent)

Special Order at 1:00 PM

6. HEALTH CARE DECISIONS (STUDY L-4000)

   Staff Draft
   Memorandum 97-75 (SU) (to be sent)

7. EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS (STUDY FHL-910)

   Staff Draft
   Memorandum 97-76 (BH) (sent 11/3/97)

8. RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS IN DISCOVERY (STUDY J-502)

   Draft of Tentative Recommendation
   Memorandum 97-77 (RM) (sent 11/3/97)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 13, 1997
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on November 13, 1997.

Commission:

Present: Christine W.S. Byrd, Chairperson
Edwin K. Marzec, Vice Chairperson
Robert E. Cooper
Allan L. Fink
Sanford Skaggs
Colin Wied

Absent: Dick Ackerman, Assembly Member
Bion M. Gregory, Legislative Counsel
Quentin L. Kopp, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law
David M. English, Health Care Decisions
J. Clark Kelso, Trial Court Unification, Administrative Rulemaking

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Melvin H. Kirschner, MD, LACMA-LACBA Joint Committee on Biomedical Ethics, Los Angeles
David Leonard, Loyola Law School, Los Angeles
Charlene Mathias, Office of Administrative Law, Sacramento
Alice Mead, California Medical Association, San Francisco
Julie Miller, Southern California Edison, Rosemead

Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles
Larry Starn, Department of Motor Vehicles, Sacramento
Cara Vonk, Administrative Office of the Courts, San Francisco

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MINUTES OF OCTOBER 9, 1997, MEETING

The Minutes of the October 9, 1997, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Revisions of Meeting Schedule

The Commission considered Memorandum 97-71, relating to suggested revisions of the meeting schedule. The Commission revised the schedule for the December 1997 and the February and December 1998 Commission meetings, as follows:

December 1997	**Sacramento**
Dec. 12 (Fri.)	9:00 am – 5:00 pm
February 1998	**Sacramento**
Feb. 23 (Mon.)	9:00 am – 5:00 pm
December 1998	**Los Angeles**
Dec. 11 (Fri.)	9:00 am – 5:00 pm

The staff should also prepare for Commission consideration at a future meeting a memorandum discussing the possibility of replacing the Commission's monthly one-day meeting schedule with a bimonthly two-day meeting schedule.

STUDY J-502 – RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS IN DISCOVERY

The Commission considered Memorandum 97-77 and attached staff draft of a Tentative Recommendation on *Response to Demand for Production of Documents in Discovery*. The Commission asked the staff to delete the suggestion in footnote 7 that practitioners should consider specifying a date for inspection that is at least 60 days after the demand. With that revision, the Commission approved the Tentative Recommendation for distribution for comment.

STUDY J-1300 – TRIAL COURT UNIFICATION

The Commission considered Memorandum 97-66 and its First Supplement, which discuss miscellaneous issues relating to the Commission's proposed implementing legislation for SCA 4. The Commission directed the staff to make the following revisions:

Gov't Code § 70210. Transitional Rules of Court

Proposed Government Code Section 70210, which requires rather than permits the Judicial Council to adopt rules of court to facilitate trial court unification, should be revised as follows:

> 70210. The Judicial Council shall adopt rules of court not inconsistent with statute for:
>
> (a) The orderly conversion of proceedings pending in municipal courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after the date the municipal and superior courts in a county are unified.
>
> (b) Selection of persons to coordinate implementation activities for the unification of municipal courts with superior courts in a county, including:
>
> (1) Selection of a presiding judge for the unified superior court.
>
> (2) Selection of a court executive officer for the unified superior court.
>
> (3) Appointment of court committees or working groups to assist the presiding judge and court executive officer in implementing unification.
>
> (c) The authority of the presiding judge, in conjunction with the court executive officer and appropriate individuals or working groups of the unified superior court, to act on behalf of the court to implement unification.
>
> (d) Preparation and submission of a written personnel plan to the judges of a unified superior court for adoption.

(e) Preparation of ~~any necessary~~ local court rules ~~that~~ necessary to facilitate the orderly conversion of proceedings pending in municipal courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after the date the municipal and superior courts in a county are unified. These rules shall, on the date the municipal and superior courts in a county are unified, be the rules of the unified superior court.

(f) Other necessary activities to facilitate the transition to a unified superior court.

References to the Small Claims Court

Statutory references to the small claims "court" should be left as is, not changed to small claims "division."

Unification Voting Procedure

Proposed Government Code Section 70201 should be revised along the following lines:

70201. (a) A vote of the judges in a county for unification shall be called by the Judicial Council on application of the presiding judge of the superior court in the county, on application of all of the presiding judges of the municipal courts in the county, or on application of a majority of the judges of the municipal court or a majority of the judges of the superior court in the county.

(b) The vote shall be taken 30 days after it is called.

(c) A judge is eligible to vote if the judge is serving in the court pursuant to an election or appointment under Section 16 of Article VI of the California Constitution at the time the vote is taken.

(d) The ballot shall be in substantially the following form:

"Shall the municipal and superior courts in the County of [name county] be unified on [specify date]? [Yes] [No]"

(e) Notwithstanding subdivisions (a) and (b), the judges in a county may vote for unification by delivering to the Judicial Council a ballot endorsed in favor of unification by unanimous written consent of all judges in the county eligible to vote.

County-specific Statutes

The Commission's recommendation should include a caveat along the following lines:

This recommendation proposes only revisions of the laws of the state relating to the courts generally. It does not propose revisions of the special statutes relating to the courts in a particular county. If the courts in a particular county elect to unify, the codes should be

reviewed at that time to determine whether the special statutes relating to the courts in that county should be revised or repealed.

For the next meeting, the staff should present examples and analyze the problems posed by county-specific statutes in greater detail than in Memorandum 97-66.

Judicial District

Proposed Code of Civil Procedure Section 38 should be revised as follows:

38. Unless the provision or context otherwise requires, a reference in a statute to a judicial district means:
(a) As it relates to a court of appeal, the court of appeal district.
(b) As it relates to a superior court, the county.
(c) As it relates to a municipal court, the municipal court district.
(d) As it relates to a county in which there is no municipal court, the county.

The amendments of Penal Code Sections 597f and 599a should be deleted from the Commission's proposal. The "judicial district" revision in the amendment of Penal Code Section 4022 should also be eliminated, but the remainder of that amendment should be retained.

Judicial Arbitration

The proposed amendment of Code of Civil Procedure Section 1141.11 should read along the following lines:

1141.1. (a) In each superior court with 10 or more judges, or 20 or more judges in a county in which there is no municipal court, all at-issue civil actions pending on or filed after the operative date of this chapter, other than a limited case, shall be submitted to arbitration, by the presiding judge or the judge designated, under this chapter if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff, which decision shall not be appealable.
(b) In each superior court with less than 10 judges, or fewer than 20 judges in a county in which there is no municipal court, the court may provide by local rule, when it determines that it is in the best interests of justice, that all at-issue civil actions pending on or filed after the operative date of this chapter, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff, which decision shall not be appealable.

(c) ~~In each municipal court district, the municipal court district~~ Each municipal court, or superior court in a county in which there is no municipal court, may provide by local rule, when it is determined to be in the best interests of justice, that all at-issue ~~civil actions~~ limited cases pending on or filed after the operative date of this chapter ~~in such judicial district~~, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter. This section does not apply to any action in the small claims ~~court~~ division, or to any action maintained pursuant to Section 1781 of the Civil Code or Section 1161 of this code.

(d) In each ~~municipal~~ court which has adopted judicial arbitration pursuant to subdivision (c), all ~~civil actions~~ limited cases pending on or after July 1, 1990, which involve a claim for money damages against a single defendant as a result of a motor vehicle collision, except those heard in the small claims division, shall be submitted to arbitration within 120 days of the filing of the defendant's answer to the complaint (except as may be extended by the court for good cause) before an arbitrator selected by the court, subject to disqualification for cause as specified in Sections 170.1 and 170.6.

The court may provide by local rule for the voluntary or mandatory use of case questionnaires, established under Section 93, in any proceeding subject to these provisions. Where local rules provide for the use of case questionnaires, the questionnaires shall be exchanged by the parties upon the defendant's answer and completed and returned within 60 days.

For the purposes of this subdivision, the term "single defendant" means (1) an individual defendant, whether a person or an entity, (2) two or more persons covered by the same insurance policy applicable to the motor vehicle collision, or (3) two or more persons residing in the same household when no insurance policy exists that is applicable to the motor vehicle collision. The naming of one or more cross-defendants, not a plaintiff, shall constitute a multiple-defendant case not subject to the provisions of this subdivision.

~~(e) The provisions of this chapter shall not apply to those actions filed in a superior or municipal court which has been selected pursuant to Section 1823.1 and is participating in a pilot project pursuant to Title 1 (commencing with Section 1823) of Part 3.5; provided, however, that any superior or municipal court may provide by local rule that the provisions of this chapter shall apply to actions pending on or filed after July 1, 1979. Any action filed in such court after the conclusion of the pilot project shall be subject to the provisions of this chapter.~~

~~(f)~~ (e) No local rule of a superior court providing for judicial arbitration may dispense with the conference required pursuant to Section 1141.16.

Comment. Section 1141.11 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). *Cf.* Section 85 & Comment (limited cases).

Subdivision (c) is also amended to refer more precisely to the small claims division. See Section 116.210 & Comment. Former subdivision (e) is deleted as obsolete.

The Judicial Council is to provide additional input on this provision, which may require further refinement.

Court Reporters

The staff and the Judicial Council are to seek further information on court reporter fees, which will be presented to and considered by the Commission at its next meeting.

STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 97-75 and the attached staff draft statute concerning health care decisionmaking. The Commission focused on areas of the draft statute that had been revised to implement recent Commission decisions relating to surrogate decisionmaking and on other parts of the draft that had not yet been considered, such as the rules governing duties of health care providers, and immunities and liabilities. The Commission made the following decisions concerning provisions in the staff draft:

§ 4662. Power of attorney for health care subject to former seven-year limit

This legacy transitional provision should be deleted. The Commission declined to expressly override the seven-year limitation required in durable powers of attorney for health care under the law from 1984-1991.

§ 4702. Requirements for printed form of power of attorney for health care

This section mandating a notice in printed forms sold in California should be omitted. It was generally agreed that those who print forms will be likely to copy the language of the statutory form in Section 4701.

§ 4703. Notice in power of attorney for health care not on printed form

This section requiring an attorney's certificate in the absence of a standard warning statement should be omitted. Powers of attorney for health care are not the unusual instruments that they were in 1982 when this provision was considered to be necessary. With the elimination of the warning requirement of Section 4702, this section has no purpose.

§ 4704. Language conferring general authority

This section deriving from the general Power of Attorney Law is not needed in the health care power context. The new statute adequately spells out the agent's authority.

§ 4705. Termination of authority

This section limiting the assumption of authority by an alternate agent named in a statutory form power of attorney for health care where the primary agent is removed by court order is overly protective and unneeded.

§ 4712. Determination of statutory surrogate

The Commission approved the general approach of the "soft priority" statutory surrogate scheme in this section, based in part on West Virginia law. The priority list should place relatives who can be objectively determined above potential surrogates who are determined by more subjective standards, i.e., the "individual in a long-term relationship of indefinite duration" and the "close friend." The concern is that health care providers may have difficulty in crisis situations applying the more subjective standards. As revised the priority list would be as follows:

> (1) The patient's spouse, unless legally separated.
> (2) The patient's adult children.
> (3) The patient's parents.
> (4) The patient's adult brothers and sisters.
> (5) The patient's adult grandchildren.
> (6) An adult in a long-term relationship of indefinite duration with the patient in which the person has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being.
> (7) The patient's close friends.

Paragraph (6) should include a specific reference to a "domestic partner."

The standard applicable to the primary physician's determination of the most suitable surrogate under subdivision (b)(1) should be based on good faith and a reasonable inquiry. The staff should devise a standard that emphasizes good faith but preserves some concept of reasonable inquiry.

§ 4713. Surrogate's assumption of authority

This section, drawn from the Uniform Health-Care Decisions Act, needs to be better adapted to the "soft priority" surrogate scheme in Section 4712. The provision in subdivision (a) permitting a prospective surrogate to "assume" authority should be revised for flexibility. Statutory recognition of a surrogate's coming forward may be useful, but should be integrated into Section 4712. It is beneficial to give authority to health care providers to require potential surrogates to provide additional information on the patient's family and friends to assist in identification of the best surrogate. Some duty on the potential surrogate to inform other family members may also be appropriate, as in subdivision (a).

§ 4715. Disqualification of surrogate by patient

The reference to an "individual" in this section should be changed to "patient" to improve its clarity. The staff should review all other uses of the term "individual" and "adult" in the statute to determine whether "patient" might not make the sections easier to understand.

§ 4716. Reassessment of surrogate determination

The reference in subdivision (a) to selecting a new surrogate "by applying the provisions of this chapter" should be moved to the Comment. The section should be redrafted so that it is clear that when a replacement surrogate is needed or where a higher ranking surrogate comes forward, the procedure in Section 4711 used to select the surrogate in the first place is applicable. Additional language may be needed to clarify how a competing surrogate can initiate a surrogacy determination.

§ 4717. Limitation on who may act as surrogate

This section should be merged with the rule in Section 4682 on who may act as an agent under a power of attorney for health care. The combined rule should then be placed in the series of general provisions that apply to both agents and other surrogates.

§ 4725. Application of chapter concerning health care decisions for patients without surrogates

To avoid inconsistencies in the applicable standards between this chapter and the statutory surrogate chapter, subdivision (a) should be revised substantially as follows:

> 4725. (a) Except as provided in subdivision (b), this chapter applies to health care decisions where (1) a health care decision needs to be made for ~~an adult~~ a patient and (2) ~~the selection of a surrogate under Chapter 3 (commencing with Section 4710) is appropriate but~~ no surrogate can be selected ~~after diligent and good faith efforts~~ under Chapter 3 (commencing with Section 4710) who is willing to serve.

The Commission discussed the relationship of this chapter concerning health care decisions for patients without agents or individual surrogates and the "Epple bill" provisions governing medical interventions for patients in long-term health care facilities under Health and Safety Code Section 1418.8. The view was generally expressed that it would be best to have one procedure governing all health care decisions for incapacitated adults regardless of the type of health care facility involved. It is anticipated that progress toward this goal may be possible as the project continues.

§ 4726. Referral to interdisciplinary team — surrogacy committee

This section was approved in concept, but needs to be redrafted to provide more guidance for the "surrogacy committee" that is given authority to approve health care decisions for patients who have no agent or individual surrogate. ("Surrogacy committee" was suggested as a more descriptive term than "interdisciplinary team," which was drawn from the Epple bill medical intervention procedure.)

It was recognized that the primary physician and nursing personnel should be a part of the surrogacy committee and that it is crucial to have some patient representative who is not involved in the patient's treatment. The statute should not provide rigid rules on the composition of the surrogacy committee or the nature of the patient representative. However, it should be clear that at least one member of the committee be able to give adequate and independent review of the proposed health care decision. Hence, the provision in subdivision (b) for involvement of a patient representative "where practicable" would be deleted. A hospital ethics committee may be an appropriate group to act as a surrogacy

committee, as long as the general statutory standard is met. The staff should propose rules concerning procedures for composing a surrogacy committee and finding an adequate patient representative. Consideration should also be given to whether the patient representative could be a member of the community and not a medical professional. Research should be done on the practices involving ethics committees in a variety of facilities throughout the state.

Operation of a surrogacy committee should generally not be governed by statute, but in consideration of the seriousness and finality of decisions concerning life-sustaining treatment, the surrogacy committee would be required to agree unanimously in making that type of decision. Other health care decisions should be made by a majority. In other respects, the surrogacy committee would have the same powers, duties, liabilities, and immunities as an individual surrogate.

§ 4734. Health care provider's or institution's right to decline

This section should be split into two sections, one covering the health care provider's right to decline to comply with instructions or decisions based on conscience, and the other covering the right to decline to administer medically ineffective health care.

§ 4735. Obligations of declining health care provider or institution

The provision in subdivision (b) concerning the duty to continue care for a patient until a transfer can be accomplished should be subject to the rules on administration of ineffective care. It should also be clear that these duties are subject to the general rules on compliance with generally accepted health care standards in Section 4654.

§ 4740. Immunities of health care provider and institution

This section should provide a general protection for actions taken in compliance with the statute, with the enumerated actions in subdivisions (a)-(c) provided as major examples and not by way of limitation. It should also be clear that the protections apply to the selection of a surrogate by a primary physician under Section 4712 and by the actions of a surrogacy committee under Section 4726.

§ 4741. Immunities of agent and surrogate

Like the preceding section, this section should cover actions of the surrogacy committee under Section 4726.

§ 4742. Altering, forging, concealing, or withholding knowledge of revocation of written advance directive

The exception to the criminal liability under this section for alteration or forgery resulting in withholding medical treatment that leads to the patient's death "except where justified or excused by law" should be omitted unless the staff can determine its purpose.

§ 4744. Statutory damages

The liability for minimum statutory damages and attorney's fees under this section should be eliminated if there are adequate remedies elsewhere under California law. It was suggested that the statutory minimum damages would provide a more useful remedy where actual damages are difficult or expensive to prove, but that to be effective deterrents, the amounts would have to be substantially increased from the $500 and $2500 levels drawn from the Uniform Health Care Decisions Act. If this section is retained, the language in the Comment to the effect that the remedy is cumulative to other remedies should be elevated to the statute.

§ 4745. Identification of agent and principal

§ 4746. Reliance by third person on general authority

§ 4747. Protection of third person relying in good faith on power of attorney

These sections deriving from the general Power of Attorney Law are not needed in the health care power context. The new statute should provide sufficient rules where needed.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-73 and an oral summary by staff of a letter from Shannon Sutherland for the California Nurses Association. A copy of Ms. Sutherland's letter is attached to these Minutes. The Commission made the following decisions:

§ 1121. Proceedings to which title does not apply

The Commission approved the staff recommendation to revise Section 1121 as follows:

> 1121. (a) This title does not apply to any of the following:
> . . . .
> (2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have express statutory authority to determine the claim.

The following should be deleted from the Comment:

> ~~This title does apply to denial by the Department of Health Services of a claim by a health care provider where the department has statutory authority to determine such claims. See, e.g., Welf. & Inst. Code §§ 14103.6, 14103.7. Judicial review of denial of such a claim is under this title and not, for example, in small claims court. See Section 1121.120 (this title provides exclusive procedure for judicial review of agency action).~~

§ 1121.120. Other forms of judicial review replaced

The Commission approved the staff recommendation to revise Section 1121.120 as follows:

> 1121.120. (a) The procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.
> (b) Nothing in this title limits use of the writ of habeas corpus.
> (c) Except as otherwise provided by statute, nothing in this title prevents or limits a small claims action.
> (d) Notwithstanding Section 427.10, no cause of action may be joined in a proceeding under this title unless it states independent grounds for relief.
>
> **Comment.** Subdivision (a) of Section 1121.120 is drawn from 1981 Model State APA Section 5-101. By establishing this title as the exclusive method for judicial review of agency action, Section 1121.120 continues and broadens the effect of former Section 1094.5. See, e.g., Viso v. State, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979). Subdivision (a) implements the original writ jurisdiction given by Article VI, Section 10, of the California Constitution

(original jurisdiction for extraordinary relief in the nature of mandamus). Nothing in this title limits the original writ jurisdiction of the courts. See Section 1123.510(b). The procedure provided in this title for judicial review of agency action replaces administrative and traditional mandamus and other forms of judicial review. To the extent consistent with this title, prior case law remains unaffected.

Under subdivision (b), this title does not apply to the writ of habeas corpus. See Cal. Const. art. I, § 11, art. VI, § 10. See also *In re* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); *In re* Stewart, 24 Cal. 2d 344, 149 P.2d 689 (1944); *In re* DeMond, 165 Cal. App. 3d 932, 211 Cal. Rptr. 680 (1985).

Subdivision (c) makes clear that nothing in this title prevents or limits a small claims action. For a statute that provides otherwise, see Welf. & Inst. Code § 14104.5.

Subdivision ~~(c)~~ (d) continues prior law. See, e.g., State v. Superior Court, 12 Cal. 3d 237, 249-51, 524 P.2d 1281, 115 Cal. Rptr. 497, 504 (1974) (declaratory relief not appropriate to review administrative decision, but is appropriate to declare a statute facially unconstitutional); Hensler v. City of Glendale, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994) (inverse condemnation action may be joined in administrative mandamus proceeding involving same facts); Mata v. City of Los Angeles, 20 Cal. App. 4th 141, 147-48, 24 Cal. Rptr. 2d 314, 318 (1993) (complaint for violation of civil rights may be joined with administrative mandamus). If other causes of action are joined with a proceeding for judicial review, the court may sever the causes for trial. See Section 1048. See also Section 598.

Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.730 (type of relief).

§ 1123.330. Judicial review of a rule

The Commission approved the staff recommendation to add the following to the second paragraph of the Comment:

Subdivision (b) continues existing law. See 1 G. Ogden, California Public Agency Practice § 22.01 (rev. June 1989) (judicial review of a rule may be had before commencement of enforcement proceedings). Subdivision (b) does not limit preconditions for judicial review, including exhaustion of administrative remedies and that the controversy be ripe for judicial review. See Section 1123.110 and Comment.

§ 1123.420. Review of agency interpretation of law

The Commission approved the staff recommendation to add the following to the Comment:

> Nothing in Section 1123.420 or this Comment is intended to incorporate or approve the distinction made in federal law between interpretive and legislative regulations.

§ 1123.460. Review of agency procedure

The Commission revised Section 1123.460 and the first paragraph of the Comment substantially as follows:

> 1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving appropriate deference to the agency's determination of its procedures:
>
> (a) Whether the agency has engaged in an unlawful ~~or unfair~~ procedure or decisionmaking process, or has failed to follow prescribed procedure.
>
> (b) Whether the agency has engaged in an unfair procedure or decisionmaking process. This subdivision does not apply to judicial review of either of the following:
>
> (1) A state agency regulation adopted, amended, or repealed under the rulemaking portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (2) Adjudication under the formal adjudication provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (c) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.
>
> **Comment.** Section 1123.460 ~~codifies~~ is consistent with existing law concerning the independent judgment of the court ~~and the deference due agency determination of procedures.~~ on questions of a legal character, including whether the administrative proceedings have been fair. Bekiaris v. Board of Educ., 6 Cal. 3d 575, 587, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). *Cf.* 5 U.S.C. § 706(2)(d) (federal APA); Mathews v. Eldridge, 424 U.S. 319 (1976). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). . . .

Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

The Commission approved the staff recommendation to make clear in Government Code Section 11350 that injunctive and other relief is available in judicial review of an underground regulation:

> (b) Judicial review of a rule alleged to be in violation of Section 11340.5 is not subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. In a proceeding for judicial review of a rule alleged to be in violation of Section 11340.5, the court may grant injunctive and other relief in addition to the relief authorized by subdivision (a).

The remaining subdivisions of Section 11350 should be relettered accordingly. The Comment should make clear the underscored language is not intended to overrule Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996).

Herb Bolz of the Office of Administrative Law renewed OAL's earlier request to exempt judicial review of all APA regulations of state agencies from the draft statute. There was no sentiment on the Commission to do this.

Welf. & Inst. Code § 14104.5 (amended). Complaints by providers; review

The Commission approved the staff recommendation to revise Welfare and Institutions Code Section 14104.5 as follows:

> 14104.5. Notwithstanding any other provision of law, the director shall by regulation adopt such procedures as are necessary for the review of a grievance or complaint concerning the processing or payment of money alleged by a provider of services to be payable by reason of any of the provisions of this chapter. After complying with these procedures, if the provider is not satisfied with the director's decision or his or her claim, he or she may , not later than one year after receiving notice of the decision, seek ~~appropriate~~ judicial ~~remedies~~ review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. This section shall be the exclusive remedy available to the provider of services for moneys alleged to be payable by reason of this chapter.
>
> This section shall not apply to those grievances or complaints arising from the findings of an audit or examination made by or on behalf of the director pursuant to Sections 10722 and 14170. Article 5.3 (commencing with Section 14170) shall govern the grievances or complaints.

☐ APPROVED AS SUBMITTED

☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

CALIFORNIA NURSES ASSOCIATION
Shaping Tomorrow's Health Care

November 12, 1997 **Via e-mail, Facsimile & U.S. Mail**

Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **Memorandum 97-73, SB 209**

Dear Mr. Sterling:

The California Nurses Association (CNA) is in receipt of Commission Memorandum 97-73 dated October 23, 1997. The following represents a discussion of our concerns generated by comments contained in the Memorandum regarding the most recent amendments to SB 209.

There are no Studies Or Outcome Data Demonstrating the Need to Change the Status Quo.

On page four (4) of the Memorandum under the Conclusion, the Commission staff states the following: "The staff believes it is incumbent on those who wish to preserve traditional mandamus to show precisely how the draft statute would undesirably affect existing law, and not merely to raise vague general theoretical concerns." Our response to this is simple. If it's not broke, don't fix it We are unaware of any study demonstrating the need to modify or dispose of traditional mandamus.

However, the contrary is true. The Commission has heard and continues to hear from numerous parties who remain strongly opposed to SB 209. We feel it is irresponsible to suggest that the burden be placed on the regulated public to show "how the draft statue would undesirably affect existing law" in the absence of evidence demonstrating that change to the existing system is necessary.

From our perspective, SB 209 represents a barrier to the rights of individuals, employees and labor unions to vindicate their rights, which is unsound public policy. Like those who have written before, we urge the Commission to abandon further efforts to enact SB 209. Thank you for the opportunity to comment on this important issue. If you have any questions you may contact the undersigned at (916) 446-5019, ext. 15.

Sincerely,

Shannon Sutherland

Shannon Sutherland, RN, JD.
Regulatory Policy Specialist

Cc: Dana Mitchell – Senate Judiciary Committee

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